

Tran (Migration) [2024] AATA 1682 (31 May 2024)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Ni Van Tran
VISA APPLICANT:	Mrs Ngoc Trang Pham
REPRESENTATIVE:	Mrs Hanh Thi Bich Ho
CASE NUMBER:	2119764
DIBP REFERENCE(S):	BCC2019/3196355
MEMBER:	Cheryl Cartwright
DATE:	31 May 2024
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa: • cl 309.211 of Schedule 2 to the Regulations • cl 309.221 of Schedule 2 to the Regulations

Statement made on 31 May 2024 at 3:01pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – genuine spousal relationship – financial aspects – nature of the household – social aspects – nature of the commitment – decision under review remitted
1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 17 December 2021 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s 65 of the *Migration Act 1958* (the Act).
3. The visa applicant applied for the visa on 25 June 2019 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 309.211 because insufficient evidence was provided to demonstrate that the visa applicant was the spouse of the review applicant as defined under s 5F of the Act.
5. The review applicant was represented in relation to the review.
6. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the visa applicant and the review applicant are spouses for the purposes of the Act.
8. In deciding this matter, the Tribunal has also had regard to evidence of events subsequent to the date of the visa application and the date of the delegate's decision.
9. In the circumstances of this case, the Tribunal considers that it is appropriate to make findings about cl 309.221 (a time of decision criterion) as well.

10. Background

11. The parties met in August 2017 when the review applicant was visiting Vietnam. He was already married at that time. After he returned to Australia in September 2017 the parties stayed in touch and the review applicant applied for a divorce from his first wife in August 2018.
12. In November 2018 the review applicant visited the visa applicant in Vietnam and the parties held an engagement ceremony. He visited again in April 2019 and the parties celebrated their marriage. A marriage certificate was registered on 20 May 2019 and the review applicant returned to Australia. The visa applicant applied for a partner visa (subclass 309/100) on 25 June 2019, and she came to Australia on a tourist visa (subclass 600) in January 2020.
13. The visa applicant was granted a bridging visa (subclass 010) on 30 March 2020 which ceased on 3 June 2020; however, the bridging visa was extended due to travel restrictions introduced during COVID lockdowns. On 27 August 2021 the visa applicant was granted a bridging visa (subclass 050) and has remained in Australia.

14. The parties celebrated the birth of a daughter on 17 August 2023 at Sydney Southwest Private Hospital, Liverpool.

Whether the parties are in a spouse or de facto relationship

15. Clause 309.211(2) requires that, at the time the visa application was made, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. With limited exceptions that only apply in relation to a decision to grant or not grant a Subclass 309 visa made on or after 20 August 2022, the visa applicant must continue to be the spouse or de facto partner at the time of the Tribunal's decision: cl 309.221. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen. A copy of his citizenship certificate dated 15 February 2017 is on the Department's file.
16. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) is effectively a question which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

17. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The parties were married in Hau Giang Province, Vietnam, on 20 May 2019. A copy of the marriage certificate is on the Department's file. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

Are the other requirements for a spouse relationship met?

18. The financial aspects of the relationship

19. Any joint ownership of real estate or other major assets, any joint liabilities, the extent of any pooling of financial resources, whether one person in the relationship owes any legal obligation in respect of the other and the basis of any sharing of day-to-day household expenses are relevant factors to consider when assessing the financial aspects of the relationship.
20. The parties provided a document dated 30 January 2022 from the Commonwealth Bank of Australia (CBA) that states that the bank had approved a home loan for the parties.
21. The parties provided copies of bank statements from the CBA for a joint account showing regular deposits, some labelled as 'salary', and regular payments for household expenses.
22. In a statutory declaration dated 2 March 2024, purported to be provided by both parties but written in the first person and signed by the review applicant, he states that the parties purchased a house together but the visa applicant's name is not on the title deed because of

her visa status. The mortgage repayments are \$1,615 per month and are drawn from their joint bank account.

23. In the statutory declaration the review applicant states that he is the primary salary earner and, since the birth of their child, the visa applicant has not worked.
24. The Tribunal notes the lack of evidence of the parties' finances provided at the time of application and gives little weight to the lack of evidence.
25. The Tribunal gives great weight to the evidence provided to it regarding the parties' joint assets and liabilities and their sharing of responsibility for household expenses.

26. *Nature of the household*

27. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are relevant matters to be considered when assessing the nature of the household.
28. As mentioned above the parties have a joint child born in August 2023 and they live together with the child. They provided a number of photographs of their preparation for the birth, their time together in hospital after the birth and during the visit of the review applicant's mother after the birth of the child.
29. In the statutory declaration mentioned above, the review applicant states that after jointly caring for the child during her first few months, he returned to work and the visa applicant had taken on the child-caring responsibility on weekdays. He states that they do housework together.
30. The review applicant also states that, when the baby was born, his mother visited from Mildura to assist with household duties and helping them with the new baby.
31. The parties live in the home they are purchasing together.
32. The Tribunal notes the lack of evidence in regard to the parties' household provided at the time of application and gives little weight to the lack of evidence.
33. The Tribunal gives great weight to the evidence provided to it in regard to the birth of a joint child and the parties' living arrangements.

34. *Social aspects of the relationship*

35. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
36. The parties provided a number of photographs of themselves in a range of locations, some with friends and including of a visit to Mildura to see the review applicant's mother and friends.
37. In the statutory declaration mentioned above the review applicant states that the parties mainly socialise at the local community Vietnamese Evangelical Church. The parties provided a photograph of themselves with the church community at Christmas 2022.

38. In a statement dated 22 May 2019 and provided at the time of application a friend of the applicant Thien An Veit Nguyen states that he met the visa applicant through their local church and also met the review applicant when he visited Vietnam. Mr Nguyen states that he would socialise with the parties and he also attended their wedding celebration.
39. In a statement dated 22 May 2019 and provided at the time of application a friend of the visa applicant Quyen Bich Tong states that she had met the review applicant at church when he was visiting Vietnam and she also attended their wedding.
40. The Tribunal notes the limited evidence regarding the social aspects of the relationship provided at the time of application and at the time of this decision; however, on balance the Tribunal gives the evidence some weight.

41. Nature of the persons' commitment to each other

42. The duration of the relationship, the length of time during which the persons lived together, the degree of companionship and emotional support that the persons might draw from each other, and whether the persons see their relationship as long-term are all aspects to be considered in determining the nature of the persons' commitment to each other.
43. The Tribunal notes that, at the time of application on 25 June 2019, the parties had been married for one month and at the time of this decision they have been married for five years. They have purchased a home together and had their first child in August 2023. Although they lived in different countries soon after their marriage in May 2019 through to January 2020 when the visa applicant arrived in Australia on a tourist visa, the parties have lived together physically for more than four years.
44. In his statutory declaration dated 2 March 2024 mentioned above, the review applicant states that, when the child is old enough she will be enrolled in daycare so that the visa applicant will be able to return to work and, depending on their finances, they plan to have a second child in four to five years' time.
45. The Tribunal notes the lack of evidence of the parties' commitment to each other at the time of application and gives little weight to this lack of evidence.
46. The Tribunal gives great weight to the evidence provided to it in regard to the parties shared commitment to the purchase of a home and the raising of a family.

47. Conclusion

48. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s 5F(2)(a) of the Act.
49. After considering all the evidence before it and for the reasons given with respect to the reg 1.15A(3) matters, the Tribunal is satisfied that, both at the time of application on 25 June 2019 and at the time of this decision, the visa applicant and the review applicant:
- had and have a mutual commitment to a shared life as a married couple to the exclusion of all others, as required by s 5F(2)(b) of the Act;
 - had and have a genuine and continuing relationship, as required by s 5F(2)(c) of the Act; and
 - lived and live together as much as possible as required by s 5F(2)(d)(i) of the Act.

50. On the basis of the above the Tribunal is satisfied that the requirements of s 5F(2) are met at the time of application and at the time of this decision.
51. Therefore, the visa applicant meets cls 309.211 and 309.221.
52. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

53. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl 309.211 of Schedule 2 to the Regulations
 - cl 309.221 of Schedule 2 to the Regulations

Cheryl Cartwright
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).